

DOCKET FILE COPY ORIGINAL

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

RECEIVED

TO: Chief, Dockets Branch

APR 26 1993

FROM: Associate General Counsel, Litigation Division  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

SUBJECT: American Civil Liberties Union v. FCC & USA,  
No. 93-1276. Filing of a new Petition for Review in  
the United States Court of Appeals for the District of  
Columbia Circuit.

DATE: April 22, 1993

Docket No(s). MM Docket 92-258

File No(s).

This is to advise you that on April 20, 1993, American Civil Liberties Union, filed with the United States Court of Appeals for the District of Columbia Circuit a:

X Section 402(a) Petition for Review  
\_\_\_ Section 402(b) Notice of Appeal

of the following FCC decision: In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materials on

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

4/20/93  
RECEIVED

APR 26 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

AMERICAN CIVIL LIBERTIES UNION,

Petitioner,

-v.-

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,

Respondents.

No. 93-1276

Filed: 4/20/93

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 and 2344, the American Civil Liberties Union ("ACLU") hereby petitions this Court for review of the Second Report and Order of the Federal Communications Commission ("the Commission") in MM Docket No. 92-258. The Second Report and Order, FCC No. 93-164, was adopted on March 25, 1993, released on April 2, 1993, and published in the Federal Register on April 15, 1993.<sup>1</sup>

<sup>1</sup> The First Report and Order, FCC No. 93-72, regulated "indecent" programming on leased access channels, and is the subject of a consolidated challenge in this Court. Alliance for Community Media v. FCC, Nos. 93-1169, 93-1171 (D.C. Cir. filed Feb. 22, 1993). The Second Report and Order regulates "indecent" programming on public, educational, and governmental channels. The Alliance for Community Media has already filed a petition to review the Second Report and Order, No. 93-1270 (D.C. Cir. filed Apr. 15, 1993) and has moved for consolidation (continued...)



creative expression and information about sexual activities

(b) cable operators may require PEG program providers to identify as "indecent" every PEG program that contains any description or depiction of sexual activity or organs that could be considered "patently offensive as measured by contemporary community standards," and cable operators may further require programmers to certify all PEG programming as indecent or not;

(c) cable operators may require program providers to identify every PEG program that contains material soliciting, promoting, inciting, threatening, or constituting illegal conduct, and cable operators may further require programmers to certify all PEG programming as soliciting, promoting inciting or ~~threatening illegal conduct or not~~

4. The Second Report and Order violates the First and Fifth Amendments because: (1) it establishes a content-based system of prior restraints on protected speech, without pursuing the least restrictive means available to implement effectively any compelling governmental interest; (2) the identification and certification requirements are unduly vague and force programmers to self-censor protected speech; and (3) the rules discriminate against certain speakers and their speech by prohibiting PEG programming which contains material which is "indecent" or solicits or promotes unlawful conduct, while at the same time identical programming by cable operators or other programmers is virtually unregulated,<sup>2</sup> and identical speech broadcast on the public airwaves is not prohibited but only channeled to evening time periods. The Second Report and Order is also in excess of statutory authority for purporting to regulate speech that assertedly is itself "unlawful conduct," and was issued in violation of the procedural requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

---

<sup>2</sup> Leased access cable programming has also been targeted for

5. The regulatory scheme is seriously disruptive to PEG programming and impermissibly delegates to private parties the power to censor the speech of others in a public forum. The harm it causes is gratuitous, because 47 U.S.C. § 544(d)(2)(A) already requires cable operators to make "lock-boxes" available to all cable subscribers that enable them to lock out any channel or program that they choose. The Commission and the courts have previously recognized that lockboxes are an effective, content-neutral way for parents to prevent their children from being exposed to programming they deem inappropriate. The Second Report and Order is arbitrary and capricious and otherwise not in accordance with law.

6. The requirement that program providers identify programs as indecent goes into effect 30 days after publication in the Federal Register, or May 15, 1993. See Second Report and Order at 16.

7. In comments to the Commission, the Petitioner requested the Commission to stay its indecency rules pending completion of court review. The Commission denied Petitioner's request. See First Report and Order, ¶ 71 n.52.

Consequently, in order to maintain the current status quo pending resolution of the grave First Amendment and statutory issues presented by the censorship scheme established in the Second Report and Order, Petitioner will shortly be moving this Court pursuant to 47 U.S.C. § 402(c) for a stay, or in the alternative for an expedited schedule for briefing and determination, and will seek consolidation of this Petition with the challenge of the Commission's First Report and Order. See supra at 1 n.1. Although this Court has already stayed the First Report and Order over the Commission's objection, the Commission has informally refused petitioner's suggestion that the parties stipulate to a stay of the Second Report and Order and consolidation of this Petition with those pending in Nos. 93-1169 and 1171.

WHEREFORE, being aggrieved by the Commission's Second Report and Order in MM Docket No. 92-258, petitioners respectfully request that this Court:

1. vacate and set aside the Commission's Second Report and Order;
2. declare unconstitutional Section 10 of the Television Consumer Protection and Competition Act of 1992, or in the alternative remand this matter to the Commission with instructions to issue a revised decision to correctly reflect



the requirements of the First Amendment and 47 U.S.C. § 531(e), Section 10, and the Administrative Procedure Act; and

3. grant such other and further relief as may be just and proper.

April 2<sup>nd</sup>, 1993

Respectfully submitted,

*Charles S. Smith (B. 4/1/93)*